Equality of Treatment Among Nations and a Bargaining Tariff

By William S. Culbertson
Washington, D. C.

TWO general policies are distinguishable in the commercial bargaining of nations. The first is the policy of negotiating for special and exclusive concessions which are not shared by third nations; the other aims at the establishment and maintenance of equality of treatment. The first proceeds on the idea that a nation may grant and seek favors to its own advantage regardless of the effect on its neighbors; the other is based on the proposition that every nation is entitled to equal treatment and that none is entitled to anything more. So basic is the distinction between these two policies, and so confused have been discussions of commercial policy involving them, that a discussion and illustration of them at some length seems desirable.

Reciprocity in the United States—A Form of Special Bargaining

We can find no better examples of special bargaining for preferential and exclusive advantages than those furnished by our own history, although cases among other nations are not infrequent. The term "reciprocity," particularly in the United States, has acquired a special meaning. When we speak of a "reciprocity agreement" we mean a national exchange of concessions with the understanding that these concessions are not to be extended generally and freely to any other nation (in some cases the foreign power has generalized its concessions).

The United States, let us say, offers an exclusive reduction in customs duties to another nation in return for a concession which is deemed satisfactory. At first glance this seems fair. It appeals strongly to the mind familiar with the doctrine of consideration in the Anglo-Saxon law of contracts. We offer the advantages of our markets in return for definite concessions, and we refuse the advantages except in those cases where reciprocal concessions are extended to us. This policy has made it possible for us to enter in good faith into reciprocity agreements, many of which have resulted from unusual circumstances, such as geographical propinquity or peculiar political relations. Our negotiation of reciprocity treaties, however, has been essentially an opportunist procedure, and warns us what to avoid in the future. It leaves out of account the interests of third nations which, under such a system of special bargaining, may be placed at a disadvantage. It opens up the necessity for an endless series of negotiations, and even retaliations, which are clearly objectionable in the complex commercial relationships of the world. Claims are made by excluded states which, if granted, defeat the purpose of the treaty and which, if not granted, are likely to invite protests and hostility.

Reciprocity and the Tariff Act of 1890

The United States attempted something in the nature of a general "reciprocity" policy under the tariff acts

of 1890 and 1897.[1] It will be recalled that in the tariff act of 1890 there was a provision, the purpose of which was to secure for the products of the United States special concessions in certain foreign markets.

Under the regular tariff we admitted free of duty sugar, molasses, coffee, tea and hides. The President was then authorized to proclaim without further action by Congress special penalty duties on these products when imported from any country that imposed, on the products of the United States, duties or other exactions which he deemed to be "reciprocally unequal and unreasonable." The offense here penalized, it should be noted, was not discrimination against the United States, not the levying of higher duties on our goods than on similar goods from other countries, but the levying of duties on American goods higher than were regarded by us as fair, in view of the free admission or the lower duties on food and raw materials which our domestic needs had led us to enact.[2]

The President was thus given power to place the goods of one nation on a less favorable basis in our market than similar goods imported from other countries in case of the refusal of that nation to grant concessions to the United States. Under this law the President concluded agreements with Brazil, with Spain for Cuba and Porto Rico, with the Dominican Republic, with Salvador, with the German Empire, with Great Britain for her West India Colonies, and with Nicaragua, Honduras, Austria-Hungary and Guatemala. We secured by these agreements all or part of the rates in the newly established conventional schedules of Germany and Austria-Hungary; that is, we were granted the rates which were also extended to all most-favored-nation countries. We secured also from the Latin-American republics certain special rates which were not generally granted to third countries; and from the Spanish and British West Indies, concessions which were shared only by the mother countries. All these agreements were terminated by the tariff act of August 25, 1894.

UNDER THE TARIFF ACT OF 1897

In the tariff act of 1897 there were three bargaining provisions, all based on the principle of special bargaining. One provided penalty duties and was, therefore, similar in method to the provision of the tariff act of 1890, but the commodities affected were changed. Under the regular tariff, free admission was granted to coffee, tea, tonka beans and vanilla beans. The President was given power to proclaim, without further action of Congress, penalty duties on these products when imported from any nation which imposed duties or other exactions on American goods which he might deem "to be reciprocally unequal and unreasonable." No agreements were negotiated under this provision, but it was a factor, as will be pointed out later, in securing for the United States preferential treatment in the Brazilian market in 1904.

Another of the bargaining methods provided for in the act of 1897 authorized the President, in return for

[1] For a full discussion, see United States Tariff Commission, *Reciprocity and Commercial Treaties* (1919). Before 1890 the United States had entered into a reciprocity treaty with Canada (1854–1866), and with Hawaii (1875–1900). In 1902 we negotiated a reciprocity agreement with Cuba, which is still in force. In 1910–11 an attempt was made to establish reciprocity with Canada by concurrent legislation. The necessary legislation was passed by the United States Congress but failed of enactment in Canada. Each one of these reciprocity agreements was a product of peculiar geographic and political relationships and was not a part of a general reciprocity policy.

[2] When France has used an argument similar to this against our high duties on peculiarly French products we have rejected it.

"reciprocal and equivalent concessions," to grant special reductions from the duties on argols, brandies, sparkling and still wines, and paintings and statuary. In this case, instead of using penalty duties, the principle was introduced of making special reductions in the regular tariff rates on certain articles in return for reciprocal reductions in the tariff rates of other countries. Here again, any agreements concluded under this provision required neither the ratification of the Senate nor the approval of Congress. A series of agreements, known as the "Argol Agreements," were negotiated and proclaimed. They were with France, Portugal, Germany, Italy, Switzerland, Spain, Bulgaria, the United Kingdom and the Netherlands; and these countries alone received the benefits of the lower rates in the American tariff. On the other hand, although we received concessions by these agreements, they were in no case confined to the United States. In most instances we simply received, either for the first time or in renewal of previous grants, all or part of the minimum and conventional rates already enjoyed by "favored" nations. In only a few cases did the agreements secure for the United States the benefit of conventional rates lower than those which had been previously effective.

The third bargaining provision in the tariff act of 1897 differs from those just considered in that the treaties negotiated under it had to be ratified by the Senate and approved by Congress before they became effective. This provision authorized the President to enter into negotiations for concessions in foreign markets, and to offer in return a reduction of not more than 20 per cent from the duties of the regular tariff schedules; or to transfer to the free list or agree to retain thereon specified articles from any country making satisfactory concessions. Treaties known as the "Kasson Treaties" were negotiated under this provision, but they failed of ratification in the Senate and, therefore, never became effective.

OUR PRESENT RECIPROCAL ARRANGEMENT WITH BRAZIL

Our arrangement with Brazil—not a formal treaty at all—is the only surviving remnant of this reciprocity period. Under section 3 of the tariff act of 1897 the President was authorized to impose a penalty duty of three cents a pound on coffee imported from countries which he thought were treating American products unequally and unreasonably.

Brazil in particular was very largely dependent on this country as a market for its coffee. An effort was accordingly made by our State Department through our legation (now an embassy) at Rio to obtain from Brazil tariff concessions in exchange for a guarantee to continue the suspension of the penalty duty on coffee. After long negotiations, the Brazilian Government in 1903 introduced a bill into the Brazilian Congress providing for a reduction in the customs duties on a number of American products, chiefly wheat flour. The opposition, which included English milling interests owning flour mills in Brazil, was successful in defeating the bill. In 1904 the Brazilian President, however, under authorization of an old law decreed a reduction of 20 per cent in the customs duties on certain American goods. The preference was revoked by the Brazilian Congress in the following year. It was reëstablished in 1906, and has continued in force until the present time, with some changes in the articles affected. The penalty section of the tariff act of 1897 was repealed in 1909 but the renewal of this arrangement with Brazil is urged each year by the State Department.

In 1920, the United States received reductions of 30 per cent on wheat flour and 20 per cent on the following articles: Condensed milk; rubber articles, as per Article 1,033 of the Tariff; clocks; dyes, as per Article 173 of the Tariff (excepting writing or printing inks); varnishes; typewriting machines; refrigerators; pianos; balances; windmills; cement; corsets; dried fruits; school supplies and writing desks.[1]

Speaking of its investigation of the effect of the Brazilian preferences, the United States Tariff Commission says:

> The preferential arrangement, in so far as its object was to secure an increase in the American share of the imports into Brazil, has been attended by a moderate measure of success. It has not succeeded in increasing the proportion of the Brazilian consumption of wheat flour which is provided by American mills, nor has it effected a substantial increase in the share of the Brazilian imports of wheat flour coming from the United States, but it has undoubtedly tended to check the decline which the economic situation was bringing about. The other preferred articles were less important, and even in the aggregate constituted only a small fraction of the total American exports to Brazil. The preference on these articles, however, had much more effect. In almost every instance the establishment of the preference was followed shortly by an appreciable increase in the American exports to Brazil, both absolutely and in relation to the total amount of Brazilian imports from all sources. The statistics indicate that the trade with Brazil in several articles, notably pianos and cement, practically owed its establishment to the influence of the preference. To some extent the growth of the trade with Brazil in the preferred articles was undoubtedly due to the effect of the special tariff treatment of American products in directing the attention of American exporters more closely to the Brazilian market.[1]

[1] On Sept. 1, 1920, these preferences were extended to goods of Belgian origin, except those by which Belgium is in no position to profit, and which, therefore, would be of no practical value to her. This is a significant breach in the exclusive feature of these preferences.

THE MOST-FAVORED-NATION PRINCIPLE IN COMMERCIAL TREATIES

These reciprocity agreements, which have thus been briefly reviewed, and the policy of bargaining for special favors which they exemplified were a natural development from the American interpretation of the most-favored-nation principle in commercial treaties. Something, therefore, should be said of this principle which is found in almost all the commercial treaties of the world.

Nations are accustomed to define their economic relations in treaties of commerce and navigation. Before the war, there was a network of these treaties[2] regulating and defining the basic conditions upon which international commerce depends. In all of them the most-favored-nation principle appeared. Its object was to protect the contracting nations from discriminations, and to assure to each party to a treaty that neither would put the other on a less favorable basis in commerce by the extension of special concessions to any third country. To be a *favored* nation does not mean *more* favored or *most* favored but *equally* favored with any other power, or it might be phrased to be an equal recipient of any favor granted to any other power.

The most-favored-nation principle should not be confused with the principle of national treatment, which occurs with equal frequency in commercial treaties. The latter is an extension to the citizens of a foreign power of

[1] United States Tariff Commission, *Reciprocity and Commercial Treaties*, (1919) pp. 312, 313.

[2] Martens, Georg Friedrich von, *Recueil Général de Traités*, etc.

privileges assured to a state's own nationals,[1] as if, for example, the citizens of Great Britain were permitted to engage in the coastwise trade of the United States. National treatment by the United States means the absence of discrimination between the American citizen and the foreigner. In the case of most-favored-nation treatment, on the other hand, the guarantee is that there shall be no discrimination as between *favored* nations, *i.e.*, as between foreign nations. Great Britain, for example, agrees that French citizens and French goods will be treated on terms of perfect equality with American citizens and goods as to customs duties, regulations and other specific matters.

In the course of time, two different forms and interpretations of the most-favored-nation principle have developed, commonly known as conditional and unconditional. Both sought in the beginning equality of treatment, but one asked concessions for concessions, while the other extended privileges automatically; the one attached a condition to its granting of most-favored-nation treatment, the other extended to all favored nations immediately and without compensation any concessions granted to any other. It will be obvious that either of these interpretations provides a practical basis for negotiations, but that the two are so far incompatible as to make their presence in the same negotiation confusing. Much difficulty has arisen because of these divergent views held by leading nations.

[1] Aliens' rights are not determined by treaties alone. Municipal law and the comity of nations frequently fill up gaps left by treaties. Even if there be no treaty at all, citizens of two nations may receive equal treatment in the territory of the other by statute law of the country of residence; or as regards protection of life, equality before the law, etc., under principles of international law accepted in all civilized countries.

THE CONDITIONAL FORM OF THE MOST-FAVORED-NATION PRINCIPLE

The unconditional form of the clause had general vogue in Europe for some decades prior to the war of 1914–1918. The United States, however, refused to accept the unconditional form and construction. Our statesmen have contended that the clause did not require us to grant concessions to a third nation unless that nation also granted similar or equivalent concessions in return. If a concession was freely made, it was extended to all other nations entitled to most-favored-nation treatment, but if it was granted in return for a concession, it was extended to the most-favored-nation only in return for an equivalent concession. A typical clause embodying the American policy is that of the treaty between the United States and Colombia, concluded in 1824, in which the parties

> engage mutually not to grant any particular favor to other nations, in respect to commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same *freely if the concession was freely made,* or *on allowing the same compensation if the concession was conditional.*

Both our Federal courts and our Department of State have in the past supported the "American," or conditional, interpretation of the most-favored-nation principle, whether or not the clauses of treaties contained specific language to that effect.[1] Both our judges and public men have taken the position that the most-favored-nation clause is not to be considered as a means of generalizing concessions, nor as an instrument of acquisition, but that it is to be regarded merely as a preventive of discriminations and a

[1] Bartram *vs.* Robertson, 122 U. S. 116 (1887); Whitney *vs.* Robertson, 124 U. S. 190 (1888); Moore's *Digest of International Law,* Vol. 5 (Section on most-favored-nation clause).

means of promising to other nations the opportunity to negotiate for concessions made to third states. Mr. Sherman, when Secretary of State, said that the object sought was "protection against the wilful preference of the commercial interests of one nation over another." In theory, the conditional form of the clause also offers to foreign nations the opportunity to give an equivalent in order to obtain concessions granted to a third power under a reciprocity agreement.[1] The difficulty in determining what is an equivalent, however, has practically prevented this phase of the conditional clause from being effective. In fact, the tendency in the United States has been to consider reciprocity agreements outside the scope of the most-favored-nation clause. Mr. Frelinghuysen, when Secretary of State, in a reply to Mexico in 1884 entered "a courteous denial that the most-favored-nation clause applies to reciprocity treaties."

Of course, concessions which are granted freely and without compensation, as in the case of Section 2 of the Canadian Reciprocity Act of 1911, are generalized even under the American interpretation of the clause.[2]

The traditional policy of the United States, which led us to avoid entangling alliances with European states, has thus had its effect on this phase of our commercial policy. We have interpreted the most-favored-nation principle in a way suited to our national isolation and complete freedom. Historically, there is much to be said for the American position. It had at first a liberalizing influence on commercial relations, and was a natural accompaniment of our independent position in international affairs. It became, however, the support of special bargaining and reciprocity treaties with their undesirable results.

[1] Moore's *Digest of International Law*, Vol. 5, p. 260.

[2] 4 Ct. of Cust. Appls. 146.

UNCONDITIONAL FORM OF THE MOST-FAVORED-NATION CLAUSE

The European, or unconditional interpretation of the most-favored-nation clause was adopted only after a thorough test of each form in actual practice. The leading commercial countries of Europe moved from the unconditional to the conditional, and later back to the unconditional interpretation. Great Britain, whose practice exhibits with greater consistency and with greater simplicity than that of any other country the possibilities of the unconditional most-favored-nation treatment, has been the leading exponent of the European form.[1]

When the European nations began to emphasize the protective features of their tariffs in the seventies and eighties of the nineteenth century, they did not return to the conditional form of the most-favored-nation clause. In the interests of this foreign commerce they began to experiment with bargaining tariff systems, and found the unconditional form of the most-favored-nation clause valuable in generalizing concessions and in maintaining commercial equality. They began with the assumption that the most that any nation should or could in the long run expect in commercial relations is equality of treatment. Constant bargaining was recognized as undesirable. The advantage of the unconditional clause was that it automatically and immediately generalized concessions made by one state to another, thus maintaining equality of treatment and making new bargains unnecessary every time two nations adjusted their tariff relations; and it guaranteed that no country would be placed on a less

[1] Hornbeck, Stanley K.: *The Most-Favored-Nation Clause in Commercial Treaties.*

favorable basis than another. A typical unconditional clause is the following from the commercial treaty between Great Britain and Japan, April 3, 1911:

> The high contracting parties agree that, in all that concerns commerce, navigation, and industry, any favor, privilege, or immunity which either high contracting party has actually granted, or may hereafter grant, to the ships, subjects, or citizens of any other State, shall be extended *immediately and unconditionally* to the ships or subjects of the other high contracting party, it being their intention that the commerce, navigation, and industry of each country shall be placed in all respects on the footing of the most-favored nation.

METHOD EMPLOYED TO MAKE EQUALITY OF TREATMENT EFFECTIVE

Equality of treatment may be adopted by a nation with reference to citizens of foreign governments seeking to trade in its markets, but a necessary corollary is the enactment of legislation which will obtain in return equality of treatment from other nations. A nation pursuing the policy of equal treatment in matters of commerce and navigation should so organize its power as to be able to obtain for its citizens such equal treatment from other nations. In a general way this has been accomplished either by the concession method or by the penalty method.

THE CONCESSION METHOD IN PRACTICE

The concession method of negotiation is based on the principle of the reduction of duties. It has the advantage of being conciliatory. Among European states it has appeared in the form of the general and conventional tariff system and the maximum and minimum tariff system. Of the European states before the war, five had single-schedule systems, the others had all adopted one or another of the multiple-schedule systems, mostly the general and conventional but some the maximum and minimum.

GENERAL AND CONVENTIONAL TARIFF SYSTEM

Under a general and conventional tariff system there is a general tariff enacted by the legislative body, and the executive branch of the government is empowered to negotiate treaties or conventions with other nations, offering reductions from the rates in the general schedule in return for reciprocal concessions. This conventional or treaty tariff, embodied in one or more treaties, was almost always generalized to all most-favored nations. There was thereby established for a definite period specified in the treaties a lower or, as it was called, a conventional tariff. In effect, therefore, the general tariff was for the purpose of penalizing a nation offering unfair and unequal treatment and the treaty rates represented the normal tariff policy of the nation.

The German tariff act of 1902 is the most typical of the general and conventional tariffs. With the exception of a few agricultural products on which the legislature fixed minimum rates, the effective rates were determined in the negotiation of a series of commercial treaties which became effective March 1, 1906.

THE MAXIMUM-AND-MINIMUM TARIFF SYSTEMS

A "maximum-and-minimum" tariff system involves the establishing, by legislation, of two complete schedules, one containing maximum and the other minimum rates for every article in the tariff list. The rates of both schedules may be identical for some items. The application of the rates, one set or the other, to given commodities of individual countries or groups of countries is left to be determined, sometimes by

separate legislation, sometimes by executive action, sometimes by the operation of treaty pledges.

France, having earlier employed the general-and-conventional system, abandoned that system in 1892 in favor of the maximum-and-minimum, and the French system has in practice since been the leading example of the latter. In the tariff law of 1892 the legislature established two complete sets of duties, the rates in the two schedules differing by about 25 per cent. The higher, or maximum, rates were to constitute the general or ordinary tariff. The minimum rates were to be applied to goods, the produce of countries where French goods enjoyed equivalent concessions and were admitted at the lowest rates of duty. The government was empowered to prolong the expiring commercial treaties, except in so far as they involved fixed rates of duty, and to apply the minimum rates to the wares of countries which should promise most-favored-nation treatment to France. Later legislation has authorized negotiations involving reductions from the maximum without according the minimum rates. Agreements so negotiated must be submitted to the legislature for ratification or rejection.

A distinct advantage of the maximum-and-minimum tariff system lies in the fact that, whether the rates of the maximum or those of the minimum tariff be applied, there remains with the legislature or with the executive—subject to restrictions prescribed by the legislature—freedom to alter the individual rates within the schedules. Thus, not only is tariff autonomy retained, but the regulation of concessions is kept well within the control of the legislative authority.[1]

[1] See report of French Tariff Commission of 1891; also N. I. Stone, "The Double-Tariff System," *The Annals* of the American Academy, Vol. 29, p. 478.

THE PENALTY METHOD IN PRACTICE

The penalty method of bargaining, the purpose of which is similar to that of the European systems, is illustrated by the maximum and minimum provision of our tariff act of 1909 (Section 2). The purpose of this penalty provision was to obtain the removal of discrimination against American interests in foreign markets. It was based on the principle that every country granting to our products the same treatment which it granted to similar products imported from other countries is entitled to equal treatment in our markets. Special concessions were not to be offered or sought, and no penalty was imposed upon foreign countries which levied higher rates on our manufactures than we did upon their raw materials. The regular tariff rates were made to constitute the "minimum tariff" of the United States. The "maximum tariff" consisted of these rates, plus 25 per cent ad valorem in addition. The President was then authorized to extend by proclamation the privilege of the minimum tariff to those countries which were found to impose no discriminations on the United States or its products. An investigation at the time disclosed a number of cases of unequal treatment of American products in foreign markets, and negotiations were instituted to remove them. More favorable treatment was obtained for the commerce of the United States in the markets of Germany, France, Portugal, Austria-Hungary, Brazil, Canada and other countries. Particular effort was made to eliminate discriminations against American cottonseed oil. Some of these discriminations were removed; but in other cases, conspicuously Austria, promises were made which were not redeemed.

Although sound in principle, the bargaining provision of the tariff act of

1909 was not sufficiently flexible to reach all cases of objectionable discrimination. This situation was brought to the attention of Congress by the Secretary of State, Philander C. Knox, in 1911, but no action resulted. Mr. Knox pointed out that discriminations continued against American products, among the most objectionable being those against that distinctively American product, cottonseed oil. Italy, Austria-Hungary, Bulgaria, and Portugal in particular, continued to discriminate against this product, or even to prohibit its importation, with the resulting advantage to other edible oils.

OUR INCREASING INTEREST IN A BARGAINING TARIFF

The experiences of the United States with commercial bargaining have been instructive, but our policy has been unsettled. In so far as these experiences indicated a general policy, they were, prior to 1909, based on the principle of special and exclusive agreements. In that year the Republican Party abandoned the policy of special bargaining, and adopted the policy of imposing penalties against any country which discriminated against American citizens. This bargaining method was in turn abandoned in the tariff act of 1913, now in force, which merely contains a general provision (Sec. 4 A) authorizing the President to negotiate general trade agreements, and providing that before these become effective, they must be ratified by Congress.[1]

The absence of a permanent bargaining policy in the United States is not difficult to understand. Our economic position has been strong. Our exports have consisted largely of food and raw materials, and have been readily absorbed by foreign markets without special effort on our part. Under such circumstances, the tariff barriers of other nations have seemed to us of relatively little importance. We have clung to the single-tariff system, with only occasional attempts to give it flexibility. Tariff makers have been concerned chiefly with our domestic needs for revenue, and for industrial development. Here and there we have been led by special conditions into agreements, or we have adopted bargaining measures as an afterthought, so to speak. On the whole, our tariff policy has been in keeping with our traditional position of isolation.

In the United States, with its vast resources and varied, complex life, the fiscal and industrial aspects of the tariff will continue to be important, but our rising influence in overseas trade, particularly in highly competitive manufactured articles, makes essential the adoption of an effective bargaining provision as an integral part of our tariff laws. Recent radical changes in our economic position have tended to emphasize the need of a permanent policy in this respect. A tendency is appearing in the commercial policy of other nations to increase discriminations in trade. They are appearing not only in tariffs but also in more direct forms, such as embargoes and prohibitions. Our national duty is to protect our citizens from discrimina-

[1] In 1916 Congress enacted another provision —provoked by the restrictive measures of belligerent nations—which provides for retaliation against prohibitions of American imports into foreign countries. It reads as follows:

"That whenever any country, dependency, or colony shall prohibit the importation of any article the product of the soil or industry of the United States and not injurious to health or morals, the President shall have power to prohibit, during the period such prohibition is in force, the importation into the United States of similar articles, or in case the United States does not import similar articles from that country, then other articles, the products of such country, dependency, or colony."

tions and unfair treatment when they pursue their legitimate business in foreign countries and we can not accomplish this unless we organize our economic power in such a way as to be able, when necessary, to compel equality of treatment. Speaking of the general policy which the United States should pursue, the Tariff Commission said, in its recent report on Reciprocity and Commercial Treaties[1]:

> A great gain would be secured, now that the United States is committed to wide participation in world politics, if a clear and simple policy could be adopted and followed. The guiding principle might well be that of equality of treatment—a principle in accord with American ideals of the past and of the present. Equality of treatment should mean that the United States treat all countries on the same terms, and in turn require equal treatment from every other country. So far as concerns general industrial policy and general tariff legislation, each country—the United States as well as others—should be left free to enact such measures as it deems expedient for its own welfare. But the measures adopted, whatever they be, should be carried out with the same terms and the same treatment for all nations.

FORM WHICH PENALTY METHOD MIGHT TAKE IN THE UNITED STATES

We are now in a position to speak in greater detail of the principles on which bargaining legislation should be grounded. We begin with the general purpose of offering equality of treatment, in the form of a minimum schedule, to all who grant like treatment to the United States and its products, and of penalizing with a maximum tariff those countries which refuse us equality of treatment.

In order to obtain the desired flexibility, Congress should define in general terms the kind and degree of unequal treatment which is to be penalized, but should leave to the President the application of the law to particular cases. The mere possibility of the imposition of maximum or penalty duties will tend to secure equality of treatment for the United States and its products without formal action. When agreements, within the provisions of the law are entered into, however, neither the ratification of the Senate nor the approval of Congress should be required. The law should be sufficiently all-inclusive to enable the President to penalize not merely open discriminations, but also discriminations more or less concealed in customs regulations, transportation rates, sanitary provisions, and even in classification where the effect is to place a distinctively American product at a serious disadvantage in competition with substitutes.

Congress should specify the upper limit of the penalty duties, and it may wish to enumerate the articles or commodities on which these duties may be imposed. In case the latter is done a variety of products should be named, selected with the view of inflicting in operation the maximum penalty on foreign countries discriminating against us, and the minimum injury on the American consumer. Accordingly, these products in the maximum tariff should be chosen from those which are imported in substantial amounts from more than one source, in order that the imposition of the additional duties on imports from any one country shall result in a diversion of that trade to another country, without great inconvenience to importers and consumers in the United States.

An imported commodity which is also produced in large amounts in this country, and the production of which could be increased, would be suitable

[1] Page 10. Some exceptions to the equality-of-treatment principle may be allowed. Cf. W. S. Culbertson, *Commercial Policy in War Time and After*, (1919) pp. 306–308.

for the list, even though it was imported from a single country. An example of a commodity which should not be included in the list is jute. India is the only source of jute, and the imposition of a maximum duty on its importation would not seriously affect the producers in India, but would fall entirely upon the American consumer.

Congress, having power to specify the maximum penalty duty and, if it be thought necessary, to enumerate the articles, should permit the President a free hand in administering the law within these limits. The necessary flexibility can not be obtained unless the President has power to proclaim, at his discretion and without further action by Congress, as circumstances may require, the maximum tariff on any or all of the articles in the tariff, or to impose any additional duty less than the full maximum penalty authorized in the law. Many discriminations can not be reached at all unless, in the administration of the bargaining tariff, the penalty can be fitted to the offense.

Penalty duties may be used with the single tariff system. Congress may enact a law providing that the free list and the dutiable list of the tariff act shall constitute the minimum tariff of the United States, and that they shall be applicable to the products of all countries, *except* in those cases in which the President shall ascertain as a fact that any country or subdivision thereof, whether by law or administrative action, enforces tariff rates, provisions, regulations, or other exactions unfavorable to American commerce, which are not equally applicable to the commerce of all other countries. In ascertaining the facts, the President may be authorized to use, in addition to the services of the State Department, the services of the United States Tariff Commission. The law then may embody the principles which have been already discussed—the enumeration of the articles in the maximum tariff (if thought necessary), the fixing of the maximum duties, the giving a free hand to the President in determining within the limits of the law the articles to be penalized, the amount of the duty in each particular case, and the authority to apply or withdraw the penalty duties as the circumstances may require.

WHERE THE PENALTY METHOD IS INEFFECTIVE

Penalty duties are effective in preventing many discriminations and have the advantage of simplicity, but there are at least two classes of important discriminations which they reach with great difficulty, if at all.

The first class is illustrated by the intermediate tariffs of Canada and Australia. The paragraph on iron and steel in the new Australian tariff of 1920 showing the British preferential tariff, intermediate tariff[1] and the general tariff is shown on page 171.

[1] The following reference to the Australian intermediate tariff is taken from a dispatch to the *Christian Science Monitor* (Boston) of Monday, May 17, 1920, from Melbourne:

Referring to reciprocity with countries other than the United Kingdom and dominions, the Minister said that the intermediate tariff rates—that was the rates between the British preference and the ordinary tariff rates—would be extended where desirable but to no other country could the Empire or United Kingdom rates be granted.

An important and significant exception to the policy of the intermediate rate or even of the special dominion rate was described by the Minister in the following terms:

"There is one important limitation upon the powers of the Minister with regard to negotiation with other countries. It is this: The Minister is precluded from entering any negotiations which will lead to a reciprocal tariff if he is satisfied that the economic conditions of any such dominion or other country are substantially lower than those prevailing in Australia. Importations from such dominions or other countries would, therefore, fall automatically under the general tariff schedule, and remain there until such time as their economic conditions assimilate more closely to our own."

PARAGRAPH ON IRON AND STEEL IN THE AUSTRALIAN TARIFF OF 1920

Tariff Items	British Preferential Tariff	Intermediate Tariff	General
136. Iron and Steel—			
(A) Pig Iron—per ton	20*s.*	30*s.*	40*s.*
(B) Ingots, Blooms, Slabs, Billets, Puddled Bars and Loops, or like crude manufactures, less finished than Iron or Steel Bars, but more advanced than Pig Iron (except castings)—per ton	32*s.*	52*s.*	65*s.*
(C) Bar, Rod, Angle, Tee; Bars of fancy pattern in the state in which they leave the rollers—per ton	44*s.*	65*s.*	80*s.*
(D) Plate and Sheet (Plain)			
(1) up to and including one-sixteenth of an inch in thickness—ad val	Free	5 per cent	10 per cent
And on and after 1st January, 1922—per ton	65*s.*	82*s.* 6*d.*	100*s.*
(2) exceeding one-sixteenth of an inch in thickness—ad val	Free	5 per cent	10 per cent
And on and after 1st January, 1921—per ton	48*s.*	68*s.*	85*s.*
(E) Wire—per ton	52*s.*	72*s.* 6*d.*	90*s.*
(F) Hoop—ad val	Free	5 per cent	10 per cent
And on and after 1st January, 1921—per ton	70*s.*	90*s.*	95s.

Canada also has an intermediate tariff, which has been in effect since 1907. In 1909, we asked that she grant American goods the rates in her intermediate tariff which had been granted to France and other European countries. Upon her refusal we threatened to apply the maximum or penalty rates of the 1909 tariff act to Canadian goods. Canada's answer was that we had always refused to generalize concessions under the most-favored-nation clause and had granted concessions only in return for concessions; that her intermediate tariff was to be extended from time to time "in consideration of benefits satisfactory to the Governor-in-Council" and was used for the purpose of negotiating commercial arrangements. Her statesmen added that if the United States were willing to offer concessions, we might have the benefits of the intermediate rates.

A few insignificant concessions were made to the United States by Canada, to prevent a trade war, but our failure to get the full benefits of the lower rates in the intermediate tariff demonstrated that penalty duties could not be used to obtain lower rates embodied in a schedule established for the purpose of negotiation with other nations for concessions.

A nation with a single tariff, such as

ours, is necessarily at a disadvantage in bargaining with countries with intermediate and minimum tariffs. Some nations grant their minimum rates to all most-favored nations unconditionally and automatically. But in a number of cases we have not received the full benefit of minimum schedules and Canada, as has been pointed out, has insisted in applying to her dealings with us our own interpretation of the most-favored-nation clause and has refused concessions except in return for concessions. The lowering of the duties in a general or maximum tariff, which represents ostensibly at least the settled policy of a country, always makes an appeal, and as long as we are not in a position to offer reductions in our tariff schedules, we are not likely to benefit fully, at least, from intermediate and minimum schedules fixed for the purpose of bargaining.

Penalty duties, in the second place, do not prevent effectively discriminations concealed in regulations and classifications. There has been a marked tendency, particularly in European tariffs, to increase the number of classifications within the different industrial groups, primarily in order to apply specific duties more accurately, but sometimes with the purpose and frequently with the result that when a concession is made to one country, the benefit to other countries entitled to the concession under the most-favored-nation clause is reduced to a minimum.

It is clear that if classification is carried far enough, third nations will benefit very little from their rights under most-favored-nation clauses. The general, or higher, tariff rates, therefore, may remain in effect on peculiarly American products, simply because we have not been in a position to negotiate for the minimum rates. Penalty duties are of little help in this situation, although Secretary Knox was able to obtain a few concessions by the use of the maximum and minimum provisions of the tariff act of 1909. Generally speaking, the result will be that we shall receive most-favored-nation treatment, but, as a matter of fact, peculiarly American products will bear relatively a much higher duty than the goods of those countries which were able to negotiate for concessions.[1]

Discriminations may also be found in regulations. From 1883 to 1891 Germany prohibited the importation of American hogs, pork and sausages. The official ground assigned for this action was sanitary but the measure was, in fact, for the protection of German agrarian interests.

FORM WHICH THE CONCESSION METHOD MIGHT TAKE IN THE UNITED STATES

At least the first of these disadvantages of the penalty method is avoided by the concession method. Congress might fix the rates of the tariff in the next revision at a level which would permit a reduction of 20 per cent thereof without injury to any American interest, and at the same time authorize the President to reduce the tariff on any article in any amount up to 20 per cent of the duty in the general schedule (or to place certain specified articles on the free list) in return for the lowest rates granted to any other nation. The law should state specifically that special and exclusive concessions were not to be asked from foreign powers and that all concessions in the American tariff granted to

[1] *I.e.*, even though the foreign country had no discrimination in mind. Of course, a bargaining tariff would hardly deter a foreign country which had adopted a policy of protection for typical American products.

any one country should be granted immediately and automatically to all other countries granting us their lowest rates.[1]

This provision, it should be noted, would differ from Section 4 of the tariff act of 1897 (the Kasson Treaty section) in three respects: (1) No ratification by the Senate of trade agreements entered into thereunder would be necessary. (2) No special or exclusive concessions would be sought, but only equality of treatment. (3) The concessions made in the United States tariff would be generalized to all countries granting us their lowest tariff.

It is obvious how this provision might be used to obtain the intermediate or minimum rates of foreign tariffs. It might also be adapted to prevent with greater effectiveness discriminations concealed in regulations and classifications. To make this possible, however, the President would have to be given discretionary power to withhold our minimum tariff rates from any country which he should find upon investigation insisted on keeping in force concealed discriminations against the United States.[2] The mere existence of high tariff rates does not constitute a discrimination. Suppose, however, a nation has a general and conventional tariff and no conventional rates are fixed on products in which the United States is particularly interested. A refusal to fix a conventional rate would constitute at least a *prima facie* case of intent to discriminate and warrant the withholding of reductions in duties on products imported from that nation.

[1] Cf. Section 644 of the Tariff Act of October 3, 1913.

[2] Cf. the act passed by the Congress of the United States to cause the removal of discriminations by Germany against American meats. U. S. Tariff Commission, *Reciprocity and Commercial Treaties*, p. 424.

DRIFT TOWARD SPECIAL BARGAINING AND DISCRIMINATIONS

At a time when a policy of equality of treatment seems particularly desirable, not only for the United States but also for all nations, a policy of discrimination and special bargaining of the harshest character is being advocated and applied by foreign nations. Indeed, it is not absent from the United States. It has appeared in the sections of the Merchant Marine Act providing for special export and import railroad rates on goods shipped in American bottoms, for an American monopoly of Philippine shipping, and for discriminatory customs duties on goods imported in American ships. Even a return to the reciprocity practices of the tariff acts of 1890 and 1897 is suggested.[1]

The policy of discrimination and exclusion expressed itself in its extreme form in the Teuton program for *Mittel Europa*, and in its counterpart among the Allies, the Resolutions of the Paris Economic Conference of June, 1916. These measures on the part of the Allies were undoubtedly justified for strategic reasons, but they have no place in a program for harmony and good will among nations. Unfor-

[1] Mr. Longworth recently said (*Congressional Record*, Dec. 21, 1920, p. 21):

If discrimination in favor of the debtor nations is to be a feature of our future tariff policy, there is one way to my mind by which it can be effectively accomplished, and that is through the medium of separate and reciprocal trade agreements. I can see difficulties in the way of such a policy, but to my mind they are by no means insurmountable. I can conceive that it might be greatly to the benefit of England or France or Italy or Belgium and not greatly to our detriment to permit them certain advantages over other countries in the shipment of certain kinds of goods into our market, in return for which it might be greatly to our benefit and not greatly to their detriment to receive in return certain advantages to American goods in their markets. Under such a policy we would not be giving something for nothing. Such arrangements would be and ought to be to our mutual advantage.

tunately, therefore, when the Allied and Associated Powers sat down at Paris to negotiate the final treaty of peace, these doctrines of revenge, punishment, exclusion and trade war were a guiding influence in the construction of the treaty, particularly in the construction of its economic clauses.

The same spirit of exclusion and narrow commercialism which ruled at Paris is still menacing the world with the possibility of trade wars. Attempts are being made to justify special discriminatory arrangements, upon the ground that only by such means can nations economically weak maintain themselves in competition with the stronger.

Certain countries, it is urged by some, should be permitted to enter into special arrangements with other nations and not be required to generalize their concessions. It may be desirable for political reasons to tolerate an exception to the general rule of equal treatment in order to enable a country to recover from the war. A general principle recognizing special bargaining would in the long run not help, but would injure nations economically weak. If such a principle be conceded to weak nations, it must be allowed also to the strong, and it is inevitable that the former would be worsted in any international test of power with the latter.

Special bargaining might work to the advantage of the weak nation if the strong refrained from exerting its power, but in international dealings that is not likely to occur. Weak nations, if they champion a régime of special bargaining, are only forging weapons for their own disadvantage. On the other hand, the principle of equality of treatment gives to the economically strong nations only the advantages which are theirs by reason of their strength. At the same time it affords the economically weak nations a degree of protection, which they can not have under the harsh procedure of a system of special dealings. The best thing in the long run for any nation (and all that any is entitled to in international affairs) is a fair, equal chance. Weak nations should count themselves happy to have this guaranteed. The United States, it is true, would have, because of its economic power, some advantages in the free, open and equal competition which would take place under a system of unconditional most-favored-nation treatment among nations, but it could obtain much greater advantage if it chose to use its power to exert pressure and exact special concessions.

OUR NATIONAL POLICY

An effective bargaining tariff in the United States is necessary to protect American interests from the discriminations which today threaten our interests abroad. The adoption of a definite policy by the United States today would unquestionably have a very wholesome, restraining effect upon objectionable tendencies in the commercial policies of other nations. The first step in the framing of such a policy would be to eliminate from our own practice unequal treatment wherever it exists. In the next place, it would be a great gain if we should set forth equality of treatment as the basic principle which is to guide us in the application of our commercial policy, and then to organize our tariff in such a way as to penalize other nations which refuse to grant to American interests equality of treatment in their markets. Furthermore, the need is great today for an agreement among the nations upon a model clause in commercial treaties guaranteeing equality of treatment. The old controversy over the conditional and unconditional most-favored-nation clause should be

avoided. It should be recognized that the object of both forms of the clause is to establish equal treatment among nations and this principle should be embodied in future commercial treaties, regardless of the traditional forms and interpretations which the clause may have had in the past.

The limits of a bargaining tariff can not now be set. In the past they have not applied to tariff relations within empires. Whether our bargaining tariff policy, however, should extend to include the preferential schedules of the self-governing dominions of the British Empire is a question which can not be considered closed. These dominions are today, for all practical purposes, nations; and having assumed the rights of nations, it seems that they should be willing also to assume the corresponding obligations.

A further question is raised by the preferential export taxes recently adopted in British West Africa and India. In the case of India, for example, an export tax of 15 per cent was imposed on hides and skins exported from India and two-thirds of this duty is remitted when exports are made with the guarantee that the hides and skins are to be tanned in the British Empire. Should we in such a case impose additional or penalty duties on *leather* and *leather goods* imported from any part of the British Empire which benefits from this special export concession? These are large problems and, since they are not such as have been disposed of under general policies of bargaining in the past, it is better to consider them as subjects for general negotiation. Nevertheless, they press for solution and those who wish to avoid trade wars and national conflict will do well to give them early consideration.

Post-War Tariff Changes and Tendencies

By BENJAMIN B. WALLACE
Washington, D. C.

THE generalization may be made that practically all countries either have increased their tariff rates since the war or are taking more or less definite steps in that direction. The statement holds even for a number of the countries whose rates are limited by treaties. The recent treaty between the United States and Siam is a first step toward the relaxation or removal of the restrictions which now limit Siamese import duties to 3 per cent ad valorem. Egypt is asking Great Britain to obtain for her a like tariff autonomy. China's tariff is limited in principle to 5 per cent ad valorem, but the rates enforced are "equivalent" specific rates, which have been revised only at long intervals, and which, in 1918, actually yielded only 2.6 per cent of the value of the imports. During that and the following year new rates "to restore an effective 5 per cent" were worked out on the basis of the prices of 1912–1916, and the new schedule went into effect in September, 1919. Most recently the powers have agreed to a temporary surtax of 10 per cent of the duties to provide funds for famine relief, and the press has announced that this will go into operation January 16, 1921. By the peace treaties, Germany and Austria were put temporarily among the countries which might not increase their pre-war tariff rates.[1]

[1] Imports from the Allied and Associated Powers were to pay for six months the lowest rates payable on similar articles on July 31, 1914. Upon vegetable products the restriction extends to an additional thirty months. (*Treaty with Germany*, Art. 269.)